Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 23 January 2014[1]

Case C-184/11

European Commission
v

Kingdom of Spain

(Commission decisions finding State aid incompatible with the common market — Measures necessary to comply with the decisions — Judgment of the Court of Justice finding that the Member State failed to fulfil its obligations — Failure to comply with the judgment in good time — Financial penalty)

1. In 2001, the Commission adopted six decisions finding certain tax measures in the Comunidad Autónoma del País Vasco ('the Basque Country') to be State aid incompatible with the common market, and requiring the Kingdom of Spain to recover that aid. In 2006, the Commission obtained a ruling from the Court that Spain had failed to comply with those decisions. It now seeks a declaration that Spain failed to comply with the latter ruling in good time, and the imposition of a lump sum penalty in respect of the period of non-compliance.

2. Spain argues that the Commission overestimated the amounts which should have been recovered and that, in any event, any penalty imposed should be lower than that sought by the Commission.

Background

The aid and the 2001 decisions

3. Between 1994 and 1997, the three provinces of the Basque Country – Álava, Vizcaya and Guipúzcoa[2] – each introduced fiscal measures of two types which remained in force until 1999 or 2000: a tax credit for businesses of 45% of investments, and a degressive four-year reduction of the tax base for new businesses, both subject to conditions.

1 — Original language: English.

2 — For the sake of consistency, I retain the Spanish spelling used at previous stages of the proceedings, although the Basque spelling differs and the official Spanish spelling now takes account of the Basque spelling.

4. The measures were not declared to the Commission. When it learned of them, it decided to initiate the procedure under Article 88(2) EC.[3] On 11 July 2001, it adopted six decisions.[4]

5. In each case, the Commission found that the measure constituted an aid scheme. Without knowing details of actual beneficiaries, it was sufficient that potential recipients could benefit from aid that was not consistent with the applicable directives, guidelines and frameworks.[5] Before concluding that the schemes had been unlawfully put into effect and were incompatible with the common market, the Commission pointed out that the decisions were 'without prejudice to whether individual aid may be regarded, in full or in part, as compatible with the common market on its own merits, either in a subsequent Commission decision or under exempting regulations'.[6] Thus, none of the decisions identified *specific aid* as incompatible with the common market and none ruled out the possibility that some of the aid might be compatible. However, all the *aid schemes* were found to be incompatible.

The assessments of compatibility

– The 45% tax credit schemes

6. The assessments are broadly the same in all three decisions.[7] The aid could be regarded as investment aid within the meaning of the 1998 Guidelines on national regional aid,[8] provided that it was based on an amount invested in the region and subject to a ceiling expressed as a percentage of that amount. However, the region's per capita GDP was too high for the regional derogation in Article 87(3)(a) EC to apply and, with regard to Article 87(3)(c), the relevant net grant equivalent ('nge') ceiling was not respected. Moreover, only initial investments could qualify within the guidelines, whereas these schemes could apply to other expenditure as well. There were also further requirements to be met.[9] Aid which did not meet the applicable criteria must be regarded as operating aid, not investment aid. Operating aid must, however, meet the criteria in points 4.15 to 4.17 of the 1998 regional aid guidelines, which was not the case here, as the provinces of the Basque Country were not outermost regions or regions of low population density. Consequently, the aid schemes did not comply with the rules on regional aid. In addition, aid for investments outside the region could not be regarded as regional, and the possibility of a derogation for aid to small and medium-sized enterprises ('SMEs') was not available as the aid was not limited to 7.5% or 15%, as appropriate, of gross grant equivalent ('gge'). In any event, certain sectors were excluded from the 1998 regional aid guidelines, but not from the aid schemes in issue.

3 — See OJ 1999 C 351, p. 29, OJ 2000 C 55, p. 2, and OJ 2000 C 71, p. 8.

4 — Decision 2002/820/EC of 11 July 2001 on the State aid scheme implemented by Spain for firms in Álava in the form of a tax credit amounting to 45% of investments (OJ 2002 L 296, p. 1); Decision 2002/892/EC of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Álava (OJ 2002 L 314, p. 1); Decision 2003/27/EC of 11 July 2001 on the State aid scheme implemented by Spain for firms in Vizcaya in the form of a tax credit amounting to 45% of investments (OJ 2003 L 17, p. 1); Decision 2002/806/EC of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Vizcaya (OJ 2002 L 279, p. 35); Decision 2002/894/EC of 11 July 2001 on the State aid scheme implemented by Spain for firms in Guipúzcoa in the form of a tax credit amounting to 45% of investments (OJ 2002 L 314, p. 26); and Decision 2002/540/EC of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Guipúzcoa (OJ 2002 L 174, p. 31) ('the 2001 decisions').

5 — Decision 2002/820, point 76; Decisions 2002/892, 2002/806 and 2002/540, point 78; Decisions 2003/27 and 2002/894, point 83.

6 — Decision 2002/820, point 98; Decisions 2002/892, 2002/806 and 2002/540, point 90; Decision 2003/27, point 105; Decision 2002/894, point 107.

7 — Decision 2002/820, points 76 to 94; Decisions 2002/894 and 2003/27, points 83 to 100.

8 — OJ 1998 C 74, p. 9, amended in OJ 2000 C 258, p. 5 ('the 1998 regional aid guidelines').

9 — Decision 2002/820, point 83; Decisions 2002/894 and 2003/27, point 89.

– The tax base reduction schemes

7. Again, the assessments are broadly the same in all three decisions,[10] and similar to those for the 45% tax credit schemes. Per capita GDP was too high for the derogation in Article 87(3)(a) EC to apply. Although aid for regional development could be compatible under Article 87(3)(c), the schemes must be regarded not as investment or employment aid but as operating aid. However, as with the 45% tax credit schemes and for the same reasons, they did not comply with the regional aid rules. Nor could the aid be considered compatible in so far as it was available to recipients subject to specific sectoral rules, in particular because it did not meet the condition of not promoting new production capacity. Finally, none of the other derogations in Article 87(2) and (3) EC was available.

8. As regards both types of tax scheme, the Commission thus judged the schemes as a whole, with regard not to the circumstances in which they *were* applied but to those in which they *might be* applied.

The operative parts of the 2001 decisions

9. In each decision, Article 1 found that the relevant aid scheme had been unlawfully put into effect and was incompatible with the common market. Article 2 required Spain to abolish the scheme. Article 3(1) required Spain to 'take all necessary measures to recover from the recipients the aid referred to in Article 1, which has been unlawfully made available to them' and to cancel all payment of outstanding aid. Under Article 3(2), the aid was to be recovered without delay in accordance with immediate and effective national procedures, and the sums were to bear interest.

The annulment proceedings, appeals and infringement proceedings

10. The authorities of the Basque provinces brought actions before the Court of First Instance seeking annulment of the six decisions.

11. Those proceedings having no suspensive effect, the Commission reminded the Spanish authorities of their obligation to recover the aid found to be unlawful in the 2001 decisions. After some two years of inconclusive exchanges, the Commission brought six infringement actions against the Kingdom of Spain in November 2003.

12. By judgment of 14 December 2006,[11] the Court of Justice declared that, by failing to adopt within the prescribed period all of the measures necessary to comply with Articles 2 and 3 of the six decisions, the Kingdom of Spain had failed to fulfil its obligations under those decisions. In particular, Spain had failed to adopt the measures necessary to recover the aid made available.[12] However, the aid in question was not identified in the 2006 judgment, nor was its identification an issue during the judicial proceedings.

13. Further exchanges between December 2006 and November 2010 revealed differences of opinion as to the amounts to be recovered. During that period, Spain recovered part of the aid. The Commission also took the view that Spain was not providing sufficient information. Pursuant to Article 228(2) EC, it sent a letter of formal notice on 11 July 2007, followed by a reasoned opinion on 26 June 2008, requiring full compliance with the 2006 judgment within two months, that is to say, by 26 August 2008.

10 — Points 78 to 90 in each decision (2002/540, 2002/806 and 2002/892).

11 — Joined Cases C-485/03 to C-490/03 *Commission* v *Spain* [2006] ECR I-11887 ('the 2006 judgment').

12 — Paragraph 81 of the 2006 judgment.

14. On 9 September 2009, the Court of First Instance dismissed the annulment actions referred to above.[13] Appeals by authorities of the Basque provinces were dismissed on 28 July 2011.[14]

15. In its judgment relating to the 45% tax credit schemes, the Court of Justice recalled that, when ruling in a general and abstract way on a State aid scheme, the Commission is not required to analyse individual cases. It is only at the recovery stage that the Member State must verify the individual situation of each undertaking, in particular whether the advantage granted was, in the hands of its beneficiary, capable of distorting competition and affecting intra-Community trade.[15]

Form of order sought

16. Meanwhile, on 18 April 2011, the Commission had brought the present action. On 30 October 2013, it modified the form of order sought. It now asks the Court essentially to

— declare that the Kingdom of Spain has failed to fulfil its obligations under the 2001 decisions and Article 260 TFEU by failing to comply with the 2006 judgment;

— order Spain to pay a lump sum of EUR 64 543 000 (a daily amount of EUR 25 817.40 multiplied by the 2 500 days between delivery of the 2006 judgment and 15 October 2013, when the aid declared illegal by the 2001 decisions was completely recovered); and

— order the Kingdom of Spain to pay the costs.

Procedure

17. Even after completion of the written procedure, the parties' statements concerning the amounts of aid which had been granted, which were to be recovered, which had been recovered and which remained to be recovered diverged considerably. The Court therefore requested each party to set out in a table its figures relating to each of the 2001 decisions, for each legal issue involved and for each undertaking concerned. The parties were also instructed to indicate the precise pages in any documents before the Court on which they relied in support of their figures, it being stated that evidence not clearly specified might not be taken into account. Their responses were received in March 2013 (the '2013 tables'). Since discrepancies and ambiguities remained, further questions were posed and answered in writing, but without dispelling all uncertainty.

18. At the hearing on 10 September 2013, the parties were asked to concentrate on issues raised by the Kingdom of Spain in its rejoinder to which the Commission had not had a full opportunity to respond.

19. On 30 October 2013, the Commission informed the Court that it was satisfied that the aid had now been recovered in full, together with interest, the last payment of which was made on 15 October 2013.

13 — For the 45% tax credit schemes, Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II-3029; for the tax base reductions, judgment of 9 September 2009 in Joined Cases T-230/01 to T-232/01 and T-267/01 to T-269/01 *Diputación Foral de Álava and Others* v *Commission*, not published in the ECR.

14 — For the 45% tax credit schemes, judgment of 28 July 2011 in Joined Cases C-471/09 P to C-473/09 P *Diputación Foral de Vizcaya* v *Commission*; for the tax base reductions, judgment of 28 July 2011 in Joined Cases C-474/09 P to C-476/09 P *Diputación Foral de Vizcaya* v *Commission*.

15 — Joined Cases C-471/09 P to C-473/09 P, cited in footnote 14 above, paragraphs 98, 99 and 102, referring to Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraphs 63, 64, 115 and 130 and case-law cited.

Summary outline of the issues

20. The Commission claims that the Spanish authorities failed to recover all the aid concerned in good time. It submits that, initially,

(i) those authorities considered aid to be compatible which did not meet the requirements in the 1998 regional aid guidelines (Spain contends that the aid was covered by previous regional guidelines or other sectoral rules and that the Commission's interpretation of the 1998 guidelines is incorrect);

(ii) those authorities applied a deduction of up to EUR 100 000 per beneficiary although the *de minimis* rules apply only when the total amount is below the threshold (Spain contends that any amount of aid below the threshold is to be disregarded);

(iii) those authorities retrospectively applied tax deductions without establishing that the requirements for their application were met (Spain contends that the deductions were correctly applied – beneficiaries who had not been entitled before because they had benefited from the aid must be entitled once the aid was withdrawn); and

(iv) not all payment orders issued were paid (Spain contends that enforcement was pursued wherever possible and that the authorities filed claims as creditors in cases of bankruptcy).

21. The parties disagree strongly as to the amounts of aid still to be recovered at the date of the 2006 judgment and at the date on which these proceedings were lodged, although they now agree that all of it had been recovered by 15 October 2013. At the date of the 2006 judgment, the Commission considered that EUR 358 million, plus EUR 270 million in interest, still fell to be recovered; for Spain, those figures were EUR 120.7 million and EUR 48.4 million respectively. At the date the application was lodged in these proceedings, the Commission considered that EUR 321 million, plus EUR 248 million in interest, were outstanding; for Spain, the figures were EUR 60 million and EUR 31 million respectively.

22. Spain accepts that much of the recovery has taken place since these proceedings were brought. It emphasises that disputed aid has been recovered with a view to limiting any penalty imposed by the Court, but without admitting that the aid in question must legally be recovered.

23. The parties disagree further as to the amounts of any penalty to be imposed. The Commission's calculation follows its Communication on the application of Article 228 of the EC Treaty.[16] Spain argues for individual penalties for each of the 2001 decisions, taking account of the fact that the Basque Country accounts for only 6.24% of Spain's GDP and applying lower coefficients for seriousness and duration.

General and preliminary remarks

24. First, the issues in this case stem to a significant extent from the fact that neither the 2001 decisions nor the 2006 judgment identified the incompatible aid. Moreover, in 2011, in appeals concerning the disputed aid, this Court confirmed that the Commission was not required to analyse the aid granted in individual cases; it was for the national authorities to verify, at the recovery stage,

16 — SEC(2005) 1658 of 13 December 2005, as updated by SEC(2010) 923 of 20 July 2010.

the situation of each beneficiary and whether the advantage granted was capable of distorting competition and affecting trade.[17] That view was already expressed to the Spanish authorities by the Commission on 3 October 2007, according to a statement made by the Kingdom of Spain, which has not been refuted by the Commission.

25. On the other hand, none of the aid was declared to the Commission before it was implemented. It was therefore 'unlawful aid' within the meaning of Regulation No 659/1999.[18] That being so, a failure to recover any of it in compliance with the 2001 decisions and the 2006 judgment constitutes a further infringement unless Spain can establish that it was correct in considering the aid to be compatible.

26. It is therefore necessary – regardless of the fact that all the aid has now been recovered – for the Court to determine how much of it Spain was required to recover, and to take that amount as the basis for determining the amount of whatever financial penalty is to be imposed in respect of the delay in recovery.

27. Second, the Commission complains that, during the pre-litigation procedure, the Spanish authorities, on the one hand, either failed to provide or delayed in providing relevant information and, on the other hand, inundated it with irrelevant documents. It is certain that many tens of thousands of pages have been produced to the Court (by both parties) and that the usefulness of many of them is, at best, doubtful. By contrast, it has taken repeated questioning by the Court to obtain some understanding of the conflicting figures on which each party bases its arguments. In my view, the Court has not been well assisted by either party in its task, which, in proceedings such as these, involves findings of fact as well as of law. That being so, it seems virtually inevitable that any amounts which the Court considers Spain to have wrongly failed to recover, and on which it must base its assessment of any financial penalty to be imposed, will be approximations.

28. Third, the Kingdom of Spain has exercised its right, under the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, to have this case heard by a Grand Chamber. It seems to me, however, that such a large formation of the Court – 15 judges – is not appropriate in a case which turns on so much factual detail as the present, unless one of the parties seeks a reversal of previous case-law. I believe, therefore, that Member States should bear those considerations in mind, in the interests of the Court's procedural efficiency, when deciding whether to exercise their right.

29. I turn now to the legal issues. I shall address: first, general issues relating to the obligation to recover the aid (1998 regional aid guidelines, incentive requirement, *de minimis* rules, sectoral and multisectoral rules, retrospective tax deductions); second, for each decision, the details of the recovery required, including any failure to pursue claims; and, finally, the amount of any penalty to be imposed.

General issues relating to the obligation to recover the aid

Compatibility with the 1998 regional aid guidelines

30. The Commission claims that the Spanish authorities did not observe the 'incentive requirement' (that an application for aid must be submitted before work is started on a project) in the 1998 regional aid guidelines with regard to the 45% tax credit schemes. Spain submits that the guidelines did not apply and, in the alternative, that the Commission's interpretation of the incentive requirement is too strict.

17 — Point 15 above.

18 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83, p. 1.

Applicability of the 1998 regional aid guidelines

– Argument

31. Spain submits that, since the aid in question was put in place before 1998, the applicable guidelines are those in the 1979 Communication on regional aid systems.[19] It cites the Commission's 2002 notice on the determination of the applicable rules for the assessment of unlawful State aid,[20] which stated: 'the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.' Moreover, the 2000 amendment to the 1998 regional aid guidelines confirmed that all new aid put into effect without having been notified to the Commission would be 'appraised in accordance with the rules and guidelines prevailing at the time when the aid is granted'. And, both in its decisions to initiate the formal examination procedure and in its 2001 decisions, the Commission indicated that the 1998 regional aid guidelines applied only to the period from 1 January 1999 onwards.

32. The Commission counters that the 1998 regional aid guidelines themselves stated (at point 6.1) that 'the Commission will assess the compatibility of regional aid with the common market on the basis of these Guidelines as soon as they are applicable. However, aid proposals which are notified before these Guidelines are communicated to the Member States and on which the Commission has not yet adopted a final decision will be assessed on the basis of criteria in force at the time of notification'. As the aid in question was not notified, the 1998 regional aid guidelines applied. Moreover, in related proceedings,[21] the Court of Justice held in 2011 that the non-notified aid in question was to be assessed in the light of the 1998 regional aid guidelines.

– Assessment

33. I cannot accept Spain's submissions.

34. It is true that the Commission was regrettably vague in its 2001 decisions, referring sometimes to provisions of the 1998 regional aid guidelines and sometimes to those of its previous communications.[22] It has also been unclear in its more general communications.[23] However, contrary to what Spain implies, the Commission explicitly relied, when initiating the formal examination procedure and in its 2001 decisions, on the incentive requirement in its 1998 regional aid guidelines.[24]

35. Moreover, the Court has held that the non-notified aid in question was to be assessed in the light of the 1998 regional aid guidelines.[25] Nor was the applicability of those guidelines contested in the proceedings leading to the 2006 judgment. On the contrary, Spain sought confirmation that the 1998 regional aid guidelines did apply.[26] It is not open to it to raise that issue for the first time when charged with failing to comply with the 2006 judgment. Nor, since compatibility with the 1998 regional aid guidelines has been an explicit criterion from the outset, can Spain object that the reasoned opinion in the present proceedings did not specifically mention those guidelines.

19 — OJ 1979 C 31, p. 9.

20 — OJ 2002 C 119, p. 22.

21 — Judgment of 9 June 2011 in Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya* v *Commission*, paragraphs 121 and 122.

22 — See in particular footnote 37 in Decision 2002/820, footnote 33 in Decision 2002/894, and footnote 34 in Decision 2003/27.

23 — Points 31 and 32 above.

24 — OJ 1999 C 351, p. 33, last paragraph; OJ 2000 C 71, p. 13, third paragraph; Decision 2002/820, point 83; Decisions 2002/894 and 2003/27, point 89.

25 — Point 32 and footnote 21 above.

26 — Paragraphs 12 and 50 of the 2006 judgment.

Interpretation of the 1998 regional aid guidelines

– Argument

36. Under the third paragraph of point 4.2 of the 1998 regional aid guidelines, an application for aid must be submitted before work is started on the projects.[27] That requirement, the Commission submits, was not met for many beneficiaries of the 45% tax credit, yet the Spanish authorities have considered the aid concerned compatible.

37. Spain notes that, in the 2001 decisions,[28] the Commission found that the 45% tax credit was 'aid conditional on investment' within the meaning of the 1979 Communication on regional aid systems,[29] implying an incentive effect. The Commission's view that *aid must be requested* before work starts is formalistic. Fiscal procedures are different: Article 5(2) of Regulation No 1628/2006[30] and Article 8(4)(b) of Regulation No 800/2008[31] merely require *the fiscal measure to be adopted* before work starts. The more stringent criterion is absent before Regulation No 1628/2006. And in a separate decision,[32] the Commission accepted aid under the 45% tax credit scheme in Álava as compatible provided that it did not exceed the 25% nge ceiling for regional aid in the Basque Country. The principle of equal treatment requires the same approach for all beneficiaries.

38. The Commission denies excessive formalism; it accepted that aid for one undertaking which had commenced exploratory work before making its application was compatible. Moreover, Regulations No 1628/2006 and No 800/2008 are not applicable here. Any application by analogy of the rule in Article 8(4)(b) of Regulation No 800/2008 is excluded by the regulation itself,[33] which was not designed to apply to cases where a detailed assessment was required. Moreover, that rule presupposes automatic entitlement to the aid, whereas in the present cases administrative approval was required. In *HGA*,[34] the Court stated that it must be shown that, without the planned aid, the investment would not take place; otherwise the aid serves merely to improve the recipients' situation. As regards equal treatment, no past interpretation by the Commission of a Treaty provision can affect the correctness of its interpretation of that provision in the decisions in issue.[35]

39. Spain rejoins that the 45% tax credits were not subject to any administrative discretion; they could not be refused to any business meeting the conditions set out in the legislation and therefore had a clear incentive effect. Moreover, the case-law exemplified by *Freistaat Sachsen and Others*[36] cannot be relied on to override the principle of equal treatment, which is a general principle of EU law.

27 — See also Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 69.

28 — Points 27 in Decision 2002/820, 23 in Decisions 2002/894 and 2003/27.

29 — Point 31 and footnote 19 above.

30 — Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ 2006 L 302, p. 29).

31 — Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ 2008 L 214, p. 3).

32 — Commission Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ 2000 L 318, p. 36), point 134 and Article 1.

33 — Article 1 and recital 7 in the preamble.

34 — Joined Cases C-630/11 P, C-631/11 P, C-632/11 P and C-633/11 P *HGA and Others* v *Commission* [2013] ECR, paragraph 105.

35 — Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 52.

36 — Cited in footnote 35.

– Assessment

40. There are three issues here. First, did the Commission accept in the 2001 decisions that there was an incentive effect and, if so, does that mean that aid under the 45% tax credit schemes did not have to be recovered? Second, should the incentive requirement be applied differently because of the schemes' fiscal nature and, if so, is the criterion of automatic entitlement fulfilled? Third, does the principle of equal treatment affect the analysis?

41. On the first point, the Commission explicitly referred to the incentive requirement in the 2001 decisions as being one of the criteria to be met if the 45% tax credit schemes were to be found compatible with the common market.[37] However, it did not state that that criterion was not met. On the contrary, it referred to the schemes not only as 'aid conditional on investment' but also as a 'tax incentive'.[38] Nor was the issue of compliance with the incentive requirement raised in the proceedings leading to the 2006 judgment. By contrast, the Commission did state in the 2001 decisions that other criteria set out in the 1998 regional aid guidelines were not met,[39] and it was on that basis that it found that the 45% tax credit schemes could not be regarded as compatible with the common market under the regional derogations in the Treaty, since they did not comply with the rules on regional aid.[40]

42. Seen in that light, Spain's argument has some plausibility. Neither in the 2001 decisions nor in the 2006 judgment was it stated that the 45% tax credit schemes failed to meet the incentive requirement, and the 2001 decisions used language which could be seen as implying that they did meet the requirement.

43. However, I consider that the Commission is correct in arguing that, as the aid schemes as a whole were unlawful and had been found incompatible with the internal market, the Member State could not, when assessing individual cases, refrain from verifying that the incentive requirement had been complied with.

44. On the second point, in subsequent regulations the Commission has expressed the incentive requirement less stringently with regard to fiscal measures.[41] There is a clear logic to its approach. If an undertaking decides to invest in a project, then applies for and is granted discretionary aid (which it could not have been certain of receiving) after it has started work on the project, the aid is unlikely to have influenced its decision to invest. Where, by contrast, it defers its decision until it is certain to be granted any aid applied for, the decision may be seen as having been dependent on the grant of aid. If a tax regime accords automatic aid for any investment meeting defined criteria, that distinction is not relevant, and the regime itself can be seen as the incentive to investment.

45. That logic, it seems to me, can be applied whenever an incentive requirement must be met. It is not necessary for that purpose to apply Regulations No 1628/2006 or No 800/2008 by analogy in their entirety, waiving the requirement that aid must be notified to and examined by the Commission in cases to which those regulations would not apply. It is simply a matter of recognising that, under certain conditions, the fact that a tax scheme is in place is a sufficient spur to investment, so that the relationship between the date on which work starts and that on which aid is applied for loses its significance. Here, we have a situation in which an incentive requirement must be met, and I agree with Spain that the assessment of fulfilment of that requirement should take account of the specific nature of fiscal measures in that regard.

37 — Decision 2002/820, point 83; Decisions 2002/894 and 2003/27, point 89.

38 — Decision 2002/820, points 25, 27, 33, 87, 90 and 91; Decisions 2002/894 and 2003/27, points 1, 7, 21, 23, 43, 49, 93, 96 and 97.

39 — Point 6 above.

40 — Decision 2002/820, points 84 to 87; Decisions 2002/894 and 2003/27, points 90 to 93.

41 — Point 37 and footnotes 30 and 31 above.

46. However, I agree with the Commission that the automatic operation of a fiscal measure is an essential part of its incentive effect and that, in circumstances such as the present, it is for the Member State to establish that that criterion is met.

47. The parties disagree on whether the credits were automatic, both referring to the relevant provincial laws, whose terms are in essence identical:

'Investments in new tangible fixed assets … exceeding ESP 2 500 million shall, by decision of the … Provincial Council, qualify for a tax credit equivalent to 45% of the amount of the investment, as determined by the … Provincial Council, to be offset against the amount of [personal] tax liability.

…

[The decision referred to] shall lay down the time limits and restrictions applicable in each individual case.' [42]

48. The Commission stresses the need for a decision of the Provincial Council, and notes that the Court in the 2006 judgment concluded from the 2001 decisions that receipt of the aid was subject to an administrative decision. [43] Spain stresses that the use of the verb form 'gozarán' ('shall qualify') deprives the Provincial Council of any discretion in the matter.

49. That latter argument seems persuasive (although of course this Court is not competent to interpret national law). However, it is in any event undermined by the fact that, even if the Provincial Council is required by law to take a decision granting the aid, it must also determine the amount of qualifying investment and lay down time limits and restrictions. Prima facie, those factors introduce a significant discretionary element in the decision, which Spain has not addressed in its argument. In my view, the rationale underlying the specific approach to the assessment of incentive effect in the context of fiscal measures must rule that approach out when the amount of aid and the conditions under which it is to be used are subject to such administrative discretion.

50. I accordingly consider that the Commission is correct to insist that aid granted after work started on the relevant project cannot meet the incentive requirement in the third paragraph of point 4.2 of the 1998 regional aid guidelines. I note moreover that it is only in respect of four undertakings in Guipúzcoa that Spain has claimed that the aid was in fact applied for *before* work started, and that the Commission has accepted that to be the case for three of them. [44]

51. Finally in this context, I turn to the principle of equal treatment. In 1999, without reference to the incentive requirement, the Commission considered aid granted under the 45% tax credit scheme in Álava to be 'compatible with the common market as regards the part of the aid which … does not exceed the ceiling of 25% nge for regional aid in the Basque Country'. [45] Spain submits that the principle of equal treatment is a general principle of EU law, that it requires the same approach to be taken in all cases involving aid granted under the 45% tax credit schemes, and that Article 14(1) of Regulation No 659/1999 specifies: 'The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

42 — Point 8 of each of the decisions relating to the 45% tax credit schemes.

43 — Paragraph 63 of the 2006 judgment.

44 — Point 98 et seq. below.

45 — Point 37 and footnote 32 above.

52. I cannot agree with that argument. The view I have reached above implies that, by not examining the aid in question against the incentive requirement in 1999, the Commission misapplied the 1998 regional aid guidelines. Spain's approach would mean that the Commission could no longer apply the incentive requirement in those guidelines in relation to any aid granted under one of the 45% tax credit schemes or even, possibly, under any subsequent comparable scheme.

53. That would, in my view, be inconsistent with the Court's case-law to the effect that the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party.[46] It is true that the 1998 regional aid guidelines, unlike some subsequent measures, do not have regulatory force but, as Spain has argued, they are binding on the Commission itself. A failure to apply them correctly in a single instance which was not challenged cannot, in the name of the principle of equal treatment, preclude the Commission from applying them correctly in subsequent cases.

54. I thus reach the view that Spain's claim that the 1998 regional aid guidelines did not apply to aid granted under the 45% tax credit schemes or that the aid complied with those guidelines must be dismissed. The amounts concerned by that claim cannot, therefore, be excluded from the obligation to recover the aid.

Compatibility with specific sectoral or multisectoral rules

55. In its application, the Commission submits that aid to certain beneficiaries under the three 45% tax credit schemes was excluded from the 1998 regional aid guidelines.[47] It had to comply, rather, with specific sectoral or multisectoral rules. However, Spain has neither recovered the aid in question nor demonstrated that those rules were observed.

The wine sector

56. The parties agree that 12 beneficiaries of the 45% tax credit in Álava were in the agricultural (wine) sector. The Commission mentions in particular Comercializadora de la Rioja Alta SLU ('Rioja Alta') as being excluded from the 1998 regional aid guidelines. In their written pleadings, the parties express different views on the rules applicable to various activities in the wine sector and on compliance with them.

57. From the 2013 tables, however, I conclude that, with minor discrepancies amounting to a few thousand euro overall, the parties agree as to the amounts to be recovered and as to those which, by March 2013, had already been recovered and remained to be recovered, in all but two of the 12 cases concerned. The two cases are Rioja Alta and Familia Martínez Bujanda SL ('Martínez Bujanda').

58. For Rioja Alta, there appears to be no disagreement as to the total amount to be recovered. The only discrepancy (of some EUR 4 million) concerns the amount already recovered by March 2013.

59. For Martínez Bujanda, I find no persuasive evidence in any document referred to by either party relevant to the issue of the applicable rules or guidelines. Moreover, the Commission's figures in its 2013 table are incoherent. I propose, therefore, that the Court should simply accept Spain's more coherent figures.

46 — For example, Joined Cases C-259/10 and C-260/10 *The Rank Group* [2011] ECR I-10947, paragraph 62 and case-law cited.

47 — 1998 regional aid guidelines, point 2 and footnote 5.

60. I conclude that there is no issue between the parties which requires it to be decided whether the disputed aid should be assessed in the light of the 1998 regional aid guidelines or of specific rules or guidelines applicable to the wine sector.

The steel sector

61. In its application, the Commission stated that a number of beneficiaries of the 45% tax credit in Álava were active in the steel sector, which is excluded from the 1998 regional aid guidelines. Spain denied that any of them were active in the relevant subsectors.[48] The Commission then listed six firms which it considered to be concerned. Spain rejoined that the rules in place when the aid in question was granted required only notification of aid in certain subsectors and the production of twice-yearly reports.[49] In any event, five of the firms cited either do not produce steel products falling within the 1988 steel framework or are not subject to any notification requirement.

62. In the 2013 tables, the Commission lists seven firms as active in the steel sector, while Spain lists six firms as concerned by the question. The firm not listed by Spain was not previously claimed by the Commission to be specifically active in the steel sector, and none of the evidence it refers to appears to concern the firm's activity. Of the remainder, there is complete agreement as to the sums and dates concerned in three cases, there are minor divergences as to dates of recovery in two cases; and there is a difference of opinion concerning the amount to be excluded from recovery in one case,[50] amounting to some EUR 4 million. However, nothing in the documents referred to by the parties indicates that the discrepancy is related to the nature of the sector in which the beneficiary is active.

63. In its application, the Commission also listed three beneficiaries of the 45% tax credit in Guipúzcoa which it considered to be active in the steel sector. With its defence, Spain produced certificates relating to the activities of those beneficiaries, which the Commission may be presumed to have accepted, since in its 2013 table it does not list any of the three as concerned by the legal issue of activity in the steel sector.

64. I conclude that there is no outstanding issue to be addressed as to whether aid was granted to undertakings active in the steel sector.

Large investment projects

65. With regard to one beneficiary of the 45% tax credit in Vizcaya,[51] the Commission claimed in its application that the Spanish authorities had deducted from the amount to be recovered a proportion greater than that authorised by the 1998 multisectoral framework.[52] Despite appreciable disagreement in the written pleadings, it seems clear from the 2013 tables that the parties now agree on the amount which was to be recovered, whatever the basis of assessment, and the Commission accepts that that amount was in fact recovered as of 20 July 2011.

66. In its reply, the Commission further claimed that two beneficiaries of the 45% tax credit in Álava had carried out large investment projects without the Spanish authorities having demonstrated that the conditions in the 1998 multisectoral framework were met. That claim does not appear in the Commission's 2013 table, and I consider it not to be maintained before the Court.

48 — Namely, subsectors identified in the Framework for certain steel sectors not covered by the ECSC Treaty (OJ 1988 C 320, p. 3, 'the 1988 steel framework').

49 — 1988 steel framework, point 4.

50 — Condesa Fabril SA.

51 — Compañía Norteña de Bebidas Gaseosas Norbega SA ('Norbega').

52 — Multisectoral framework for regional aid to large projects (OJ 1998 C 107, p. 7).

67. There are, consequently, no outstanding issues to be addressed as regards the applicability of the 1998 multisectoral framework.

Deductibility of aid below the de minimis *ceiling*

68. Under Article 2 of Regulation No 69/2001,[53] aid measures were deemed not to meet all the criteria of Article 107(1) TFEU, and not to fall under the notification requirement of Article 108(3) TFEU, if, in particular, the total aid granted to any one enterprise did not exceed EUR 100 000 gross (or gge) over any period of three years. Article 3 of that regulation required Member States to verify that any grant of such *de minimis* aid met those criteria in each case and to keep relevant records for 10 years, producing them on request. Similar rules were previously set out in the 1996 Commission notice on the *de minimis* rule for State aid,[54] although there was no record-keeping requirement.

69. In recovering the aid in the form of a tax base reduction for new businesses, the Spanish authorities originally deducted EUR 100 000 per three-year period from the amount to be recovered from each beneficiary, for most of whom the aid exceeded that sum.

Argument

70. The Commission submits that only aid which totals under EUR 100 000 over a three-year period can qualify as *de minimis* aid; moreover, the Spanish authorities have not produced any documents to show that the aid was *de minimis*. Aid cannot be split into a part below the *de minimis* ceiling and a part above. As a derogation from Article 107(1) TFEU, the *de minimis* concession must be interpreted strictly, whether under the 1996 notice or under Regulation No 69/2001. Its aim of simplifying procedures would not be achieved if it applied to larger amounts which in any event require investigation. If recipients were sure to retain the portion of aid under the ceiling, there would be no encouragement to limit amounts or to refrain from putting aid into effect prior to approval.[55] The WAM decision to which Spain refers[56] was not the only precedent available.[57]

71. Spain submits that the applicable text is the 1996 notice, under which there was no obligation to keep records to establish *de minimis* status over a three-year period. In any event, there could be no accumulation of previous aid in the case of new businesses. Moreover, the aim of recovery is to restore a situation in which there is no distortion of competition, and the rationale for the *de minimis* derogation is that aid below the ceiling does not affect trade between Member States.[58] Since aid under EUR 100 000 over three years is deemed not to distort competition, it is enough to recover the amount over that sum. It would be disproportionate if aid of EUR 100 000 did not need to be notified whereas unnotified aid of EUR 100 000.01 had to be recovered in full. In the WAM decision, the Commission

53 — Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30). That regulation was replaced by Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ 2006 L 379, p. 5), itself replaced by Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ 2013 L 352, p. 1).

54 — OJ 1996 C 68, p. 9 ('the 1996 notice').

55 — Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08 *Regione autonoma della Sardegna* v *Commission* [2011] ECR II-6255, paragraphs 299 to 311. The appeals against that judgment (*HGA and Others* v *Commission*, cited in footnote 34) did not concern the *de minimis* issue.

56 — Commission Decision 2006/177/EC of 19 May 2004 on State aid No C 4/2003 (ex NN 102/2002) implemented by Italy for WAM SpA (OJ 2006 L 63, p. 11). It was annulled by the judgment of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italy and WAM* v *Commission* (upheld in Case C-494/06 P *Commission* v *Italy and WAM* [2009] ECR I-3639), but without reference to the *de minimis* rule.

57 — The Commission cites Decisions 2000/46/EC (OJ 2001 L 18, p. 18), 2002/142/EC (OJ 2002 L 48, p. 20), 2003/643/EC (OJ 2003 L 227, p. 12) and 2006/937/EC (OJ 2006 L 366, p. 1). In none of those decisions, it says, did it take the same approach as in the WAM decision.

58 — See Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), which was the legal basis for Regulation No 69/2001; see in particular recital 9 in the preamble and Article 2.

ordered recovery of only the aid which exceeded the ceiling. That decision was annulled, but not on grounds relevant to the *de minimis* rule. Finally, Spain alleges breach of the principle of equal treatment. In a previous case,[59] Spain had recovered only those amounts exceeding EUR 100 000 for each three-year period, a procedure with which the Commission had been satisfied.

Assessment

72. First, I consider that this issue falls to be assessed in the light of the 1996 notice. In each of the three decisions concerning the tax base reductions, the Commission referred specifically to that notice when finding that the aid under the relevant schemes did not meet the *de minimis* rule.[60] It also stated that the result would be the same under Regulation No 69/2001,[61] but that that regulation applied only to aid granted after its entry into force on 2 February 2001.[62] The Commission has not made any specific claims relating to aid granted between that date and the suppression of the disputed aid schemes.[63]

73. The obligation to keep and produce records was not in the 1996 notice. However, I cannot accept that Spain was not required to establish that the cumulative three-year ceiling was respected by aid which, in reliance on the *de minimis* rule, was not recovered. It thus had to produce relevant documentation. The argument that the schemes applied only to new businesses is of no avail, since they all applied 'over four consecutive tax periods, starting from the first one in which, within four years from start-up, [the businesses] obtain positive tax bases …',[64] so that periods greater than three years were involved. The Commission claims that no documentation was produced. Spain's only refutation is to say that it sent the Commission the tax declarations of the businesses concerned, which revealed no other grants of aid. I do not consider the submission of documents which do not show the existence of aid sufficient to prove the absence of aid or to establish that the *de minimis* ceiling was not exceeded by cumulative aid over any three-year period.

74. As regards the possibility of splitting aid into a *de minimis* and a non-*de minimis* element, the second subparagraph of Article 2(2) of Regulation No 1998/2006[65] provided: 'When an overall aid amount provided under an aid measure exceeds [the] ceiling, that aid amount cannot benefit from this Regulation, even for a fraction not exceeding that ceiling. …' The legal situation during the course of the procedure before the Court, at least until the date by which all the disputed aid had been recovered,[66] was thus as argued by the Commission, but the explicit rule was new in 2006.

75. Nor has the Commission always embraced the approach it is now advocating, and the WAM decision is not the only instance. For example, in 2005, it stated: 'The obligation to recover the aid does not … rule out the possibility that all *or part of* the aid granted to individual beneficiaries may be compatible under Article 2 of Commission Regulation (EC) No 69/2001 …'.[67] And in a case

59 — Case C-177/06 *Commission* v *Spain* [2007] ECR I-7689.

60 — Points 20 and 75 in each of the three decisions, and footnotes thereto.

61 — Footnote to point 75 in each of the three decisions.

62 — Article 4 of that regulation, read in conjunction with Article 4 of Regulation No 1998/2006, cited in footnote 53 above.

63 — See also points 23 and 24 of its application in the proceedings leading to the 2006 judgment, in which it accepted that no further aid could be granted after 23 October 2001 at the latest.

64 — Point 7 of each of the three decisions.

65 — Cited in footnote 53.

66 — The same explicit rule does not appear to be present in Regulation No 1407/2013 (cited in footnote 53), although Article 3(7) of the latter provides: 'Where the relevant ceiling … would be exceeded by the grant of new *de minimis* aid, none of that new aid may benefit from this Regulation'.

67 — Commission Decision 2006/638/EC of 6 September 2005 on the aid scheme implemented by Italy for certain undertakings for collective investment in transferable securities specialised in shares of small- and medium-capitalisation companies listed on regulated markets (OJ 2006 L 268, p. 1), point 60, emphasis added.

concerning the recovery of aid found incompatible with the common market save in so far as it met the *de minimis* conditions, the Commission asked why it should not be possible to seek reimbursement of the whole amount of the aid, leaving the beneficiary to establish that a part of it in fact fell within the exemptions for *de minimis* aid.[68]

76. Thus, while it is commendable that a clear rule was put in place by Regulation No 1998/2006, the content of that rule cannot be assumed to have applied before its formal enactment. But what rule was applicable then?

77. The dual aims of the *de minimis* rules – to identify aid which has no perceptible effect on competition or trade between Member States and to allow the Commission to concentrate on aid which exceeds the ceiling – lead to the contradictory views put forward by the parties, both of which have some justification.

78. I consider, none the less, that the Commission is correct. Its argument was endorsed, clearly and in detail, by the General Court in *Regione autonoma della Sardegna* v *Commission*,[69] which must be regarded as a correct statement of the law as it stood even before Regulation No 1998/2006. That statement concerned Regulation No 69/2001, which is not applicable in the present case, but its reasoning was based on the general principles underlying the *de minimis* derogation. The fact that the judgment in question had not been delivered at the time when Spain was required to recover the aid at issue does not invalidate it as a correct statement of the pre-existing state of the law. Nor can Spain rely on any clear indication that the situation prior to Regulation No 1998/2006 was not the same as it is now, but only on a lack of clarity as to the situation. In those circumstances, it could only cooperate with the Commission, pursuant to the principle of sincere cooperation now embodied in Article 4(3) TEU, in order to dispel any uncertainty.

79. Finally, as regards the alleged breach of the principle of equal treatment, Spain raised the issue only in its rejoinder, without presenting any evidence that, in the previous case mentioned, it had in fact recovered only amounts exceeding EUR 100 000 for each three-year period. Its argument, therefore, cannot be relied upon.

80. Bearing in mind also that the aid schemes were, overall, unlawful, I thus reach the view that the Spanish authorities were not entitled to exclude from recovery amounts of aid which fell under the applicable *de minimis* ceiling of EUR 100 000, where the total aid to the beneficiary exceeded that ceiling.

Retrospective application of other tax deductions

Argument

81. The Commission states that, with regard to the aid under the 45% tax credit scheme in Álava and Guipúzcoa and under the reduction of the tax base for new businesses in Álava, Spain has reduced the amount of which it seeks recovery by retrospectively applying certain tax deductions in circumstances where they were not, or where it is not established that they were, properly accorded under the applicable legislation, namely Articles 37 and 45 of Provincial Law 24/1996 in Álava and Article 37 of the 'practically identical' Provincial Law 7/1996 in Guipúzcoa.

68 — Case C-214/07 *Commission* v *France* [2008] ECR I-8357; see the Commission's reply, at point 25.

69 — Cited in footnote 55.

82. Article 37 of each of those laws accords businesses a tax deduction equal to 15% of the amount of investments in new fixed assets (excluding land) allocated to developing their economic activity, subject to certain conditions. Article 45(1) of the Álava law accords a deduction of ESP 600 000 (EUR 3 606) for each job created, as long as it is maintained for two years. Where a 10% increase in staff is coupled with a 10% reduction in working hours, Article 45(2) waives certain conditions under Article 37 and increases the deduction under both articles, provided that detailed plans are presented to the tax authority.

83. The Commission does not deny the possibility of retrospective application of those deductions. However, for a number of beneficiaries of the aid found to be illegal, the Commission asserts that Spain has not provided evidence that the deductions were accorded in compliance with the applicable conditions. Spain replies that relevant evidence was provided during the pre-litigation procedure, and has produced further documentation in the course of these proceedings. The Commission does not accept that evidence as sufficient with regard to Álava, but does accept that the infringement came to an end with regard to Guipúzcoa when the defence was lodged.

Assessment

84. It seems to me that this aspect of the Commission's case should be dismissed. The *deductions* in issue are not alleged to form part of any of the tax *credit* schemes which were found to constitute unlawful State aid. They are not mentioned in the 2001 decisions or in the 2006 judgment, and the infringement alleged in the present proceedings is failure to comply with the latter. Consequently, whether the deductions were (or have been shown to have been) correctly granted in accordance with national law is a question which falls outside the scope of these proceedings.

85. Admittedly, the Commission's complaint in this regard is not unconnected with the recovery of the aid in the form of tax credits found to be unlawful in the 2001 decisions. It is concerned with amounts of that aid which have not been recovered, on the ground that the beneficiaries could have claimed equal amounts if the unlawful aid had not existed but were prevented from claiming because they received that aid. But it does not allege that those amounts have been wrongly assessed as aid which was compatible and which therefore did not have to be recovered.

86. Moreover, the Commission accepts that Spain's approach is in principle valid. It does not, for example, claim that all the unlawful aid should first have been recovered, the deductions in issue being then implemented separately (which could also have been a valid approach). If such an approach had been taken, or insisted on by the Commission, there can be no doubt that the conditions under which the deductions were implemented were quite unrelated to compliance with the 2006 judgment (even if, assessed separately, those deductions had themselves proved to constitute unlawful aid). I do not see that the analysis can be different simply because, instead, one set of tax benefits (the deductions) was offset against the other (the credits), if offsetting is accepted as a valid procedure.

Amounts falling to be recovered under each decision

87. I have reached the following views: (1) that the need to recover the disputed aid falls to be assessed in accordance with the 1998 regional aid guidelines; (2) that the incentive requirement in those guidelines permits the non-recovery only of aid for which it is established that the application was submitted before work started on the investment project; (3) that there are no outstanding legal issues between the parties as regards the applicability of specific sectoral or multisectoral rules; (4) that the Spanish authorities were not entitled to exclude from recovery amounts of the disputed aid which fell

below the *de minimis* threshold of EUR 100 000 per three-year period; but (5) that the Commission is wrong to claim that amounts corresponding to tax deductions granted retrospectively, for which the beneficiaries did not qualify as long as they were in receipt of the disputed aid, should have been recovered.

88. In the light of those conclusions, it remains to be determined how much aid was subject to a legal requirement of recovery in respect of each of the 2001 decisions. That will involve considering the figures put forward by both parties in their 2013 tables and – where appropriate and where possible – resolving discrepancies.

89. The figures I cite below are not all given as such by the parties but result in some cases from comparisons between the figures which they do give.

Decision 2002/820 (45% tax credit in Álava)

90. From the 2013 tables, it appears, first, that the only disagreement as to the amount of aid initially granted concerns a difference of EUR 2 048.87 for Martínez Bujanda. I propose to resolve that difference in Spain's favour.[70] Second, the Commission considers that EUR 10 683 553.22 should have been recovered in respect of retrospective tax deductions. I propose to disregard that amount.[71] For the remainder (compliance with the 1998 regional aid guidelines), the Commission considers that EUR 207 461 498.01 fell to be recovered. I have taken the view that only amounts with regard to which Spain has established that the application was submitted before work started on the investment project should be disregarded.[72] Spain has not alleged the existence of any such cases in Álava.

91. Consequently, allowing for the difference regarding Martínez Bujanda, I consider that EUR 207 459 449.14 fell to be recovered.

92. It is not disputed that the totality of that sum (together with interest) had been recovered by 15 October 2013. From the dates given by the parties, it appears that recovery took place for the most part from March 2012 onwards and was about 90% complete by March 2013.

Decision 2002/892 (reduction of the tax base in Álava)

93. As regards the deductions originally made by Spain by virtue of the *de minimis* rules, the 2013 tables show agreement between the parties on a total amount of EUR 2 316 461.49, recovered between September 2011 and September or December 2012. There is some disagreement regarding retrospective tax deductions, but I propose in any event to disregard those amounts.[73]

94. There remains a dispute concerning the recovery of EUR 2 586 312.37, together with interest, from a company in liquidation.[74] The Commission states that it was not informed until 21 January 2013 that the authorities' claim had been adequately lodged, whereas Spain states that it was informed on 28 June 2010. The basis is in both cases a letter allegedly sent to the Commission by the Spanish authorities but in neither case identified among the tens of thousands of pages of evidence submitted to the Court. In those circumstances, I propose that the Court should take the earlier date into account.

70 — Point 59 above.

71 — Points 81 to 86 above.

72 — Point 38 et seq. above.

73 — Points 81 to 86 above.

74 — Gasteiz Desarrollo Industrial e Ingeniería SA ('Gasteiz Desarrollo').

Decision 2003/27 (45% tax credit in Vizcaya)

95. The only point in issue with regard to this decision concerns the date on which the Spanish authorities established that the sum of EUR 6 194 944.87 was correctly deducted from the amount recovered from Norbega.[75] I conclude from the pleadings and the 2013 tables that the sum actually to be recovered[76] was in fact recovered in November 2007, but that proof of the correctness of the deduction was not provided until July 2012, with the defence in the present proceedings. The amount of aid (agreed by both parties to be EUR 59 247 555.26) in dispute with regard to the incentive requirement must be regarded as subject to recovery.[77]

96. Consequently, in the light of the case-file, I propose that the Court should consider that EUR 66 664 908.29 fell to be recovered pursuant to Decision 2003/27, of which EUR 54 261 801.88 was recovered between September and November 2011, EUR 7 417 353.03 in July 2012, and EUR 4 985 753.38[78] in February 2013, together with interest.

Decision 2002/806 (reduction of the tax base in Vizcaya)

97. The only issue in the context of this decision concerns the deductions originally made by Spain by virtue of the *de minimis* rules. The total amount involved is agreed to be EUR 2 004 658.60, all of which was recovered (together with interest) between 30 September and 14 November 2011.[79]

Decision 2002/894 (45% tax credit in Guipúzcoa)

98. The issues with regard to this decision are: first, exclusion of three undertakings in the steel sector, an issue which I consider to be abandoned by the Commission;[80] second, retrospective deduction of other taxes, in the amount of EUR 4 110 495.50, which I propose to disregard;[81] third, compliance with the incentive requirement, in respect of aid of EUR 5 909 830.30 to the firm GKN;[82] fourth, the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty[83] to the aid of some EUR 20 million to the firm Papresa.[84]

99. The 2013 tables show a number of discrepancies between the figures given by the parties; those provided by Spain are in some cases difficult to reconcile internally, while those of the Commission are sometimes more favourable to Spain. In those circumstances, I prefer to take the Commission's figures as a basis. It considers that EUR 39 900 773.41 was to be recovered. I shall take that to be the case, subject to a difference of opinion regarding EUR 5 909 830.30 for GKN and EUR 20 million for Papresa.

75 — Point 63 above.

76 — Agreed to be EUR 7 417 353.03.

77 — Point 38 et seq. above.

78 — Aid to Industrias de Maderas Aglomeradas.

79 — With regard to one sum of EUR 200 000 (Ingenería y Construcción de Matrices), the Commission asserts that recovery was not effected (or proven) until 11 July 2012, but the evidence to which it refers has not been presented to the Court.

80 — Point 63 above.

81 — Points 81 to 86 above.

82 — GKN Driveline Zumaia SA. In three other cases, the Commission has accepted that the incentive requirement was met and in eight more Spain has not claimed that the application for aid was submitted before work started on the project (point 38 et seq. above).

83 — OJ 1994 C 368, p. 12, replaced in OJ 1999 C 288, p. 2 ('the [1994/1999] rescuing and restructuring guidelines').

84 — Papresa SA. There is a discrepancy of some EUR 500 000 between the figures given by the Commission and by Spain for the amounts of aid.

100. With regard to GKN, Spain claims that the only expenditure prior to submission of the application for aid was negligible and concerned feasibility studies; the Commission does not accept the evidence provided. Spain refers to documents in the annexes to the Commission's application, which I have been unable to find by following its indications.[85] I therefore do not accept that Spain has established that the incentive requirement was met.

101. With regard to Papresa, Spain submits that the firm is the successor to La Papelera Española SA, whose status as an undertaking in difficulty was recognised by the Commission in 1993.[86] It refers to point 99 in Decision 2002/894, where the Commission referred to its statement in the 1999 rescuing and restructuring guidelines that it 'considers that aid for rescue and restructuring may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest if the conditions set out in these guidelines are met'.

102. However, that argument was raised only in the rejoinder and the Commission did not have an opportunity to respond to it. Spain omitted, moreover, to point out that point 99 in Decision 2002/894 continued as follows: 'If those conditions are not met, the aid is incompatible with the common market where it is intended for firms in difficulty. The Commission therefore finds that the tax aid in question, where granted to firms in difficulty, is not compatible with the common market under the derogation in Article 87(3)(c) of the Treaty on the promotion of certain activities.' To demonstrate compliance with the conditions in the 1994 rescuing and restructuring guidelines, Spain submits an expert report which purports to certify compliance with the general conditions in point 3.2.2 of those guidelines. However, perusal of that report reveals that the conditions are cited only in truncated form and that certain aspects were not examined.

103. In those circumstances, I do not consider that Spain has established that the aid to Papresa can be considered to meet the conditions in the rescuing and restructuring guidelines.

104. I conclude that EUR 39 900 773.41 fell to be recovered under Decision 2002/894. The parties agree that, with the exception of the aid to Papresa, the amounts in question were recovered, together with interest, between November 2011 and October 2012. The outstanding aid to Papresa (EUR 19 448 623.59, together with interest) was recovered between March and September 2013.

Decision 2002/540 (reduction of the tax base in Guipúzcoa)

105. In its 2013 tables, the Commission claims that EUR 211 159.23 was wrongly excluded from recovery by way of retrospective tax deductions. I propose to disregard that amount.[87]

106. The parties agree that the amount concerned by the *de minimis* deductions was EUR 1 344 192.60, an amount which, in my analysis, fell to be recovered. According to the Commission, the whole amount was recovered, with interest, during 2012. Spain gives earlier dates for completion of recovery, but they appear to relate to recovery of amounts other than those deducted as *de minimis*. I propose therefore to accept the Commission's dates.

107. Finally, there is a curious amount of EUR 8.74, in respect of which the Commission claims that the payment order was not complied with. Since the Commission also states in a different table that the same amount was to be excluded from recovery, I propose to disregard it.

85 — I acknowledge that the presentation of those annexes, in the form of DVDs containing 'zipped' folders of non-searchable pdf pages, makes it more difficult to identify any particular document, but Spain was informed that it must clearly specify the evidence relied upon (point 17 above).

86 — Commission Notice C 29/92 (NN 12/92), OJ 1993 C 123, p. 7.

87 — Points 81 to 86 above.

Conclusion on the amounts to be recovered

108. I conclude that, in round figures, a total principal sum of EUR 322 million fell to be recovered at the date of the 2006 judgment, some 10% lower than the EUR 358 million advanced by the Commission. I cannot calculate the amount of interest due with any accuracy, but I propose that the Court consider that, too, to be 10% lower than the figures given by the Commission.

109. According to the Commission, some 13% of the total had been recovered by the date the present proceedings were brought. In view of the Commission's failure to clearly establish its claim with regard to Gasteiz Desarrollo,[88] I propose to consider that the true figure was 14%. The remaining 86% was recovered after the commencement of these proceedings, between September 2011 and October 2013.

Financial penalty (lump sum)

Argument

110. The Commission refers to its current guidelines on the application of Article 260 TFEU,[89] in which it states that it will ask for both a lump sum penalising the continuation of the infringement between the first and the second judgments and a penalty payment for each day of further delay following the second judgment. In the present case, it has withdrawn its claim for the latter penalty. The Commission calculates the lump sum either as a minimum fixed for each Member State based on its 'n' factor[90] or by multiplying a daily amount[91] by the number of days between the date of the first judgment and that of the end of the infringement, if that multiplication leads to a greater total.

111. In the present case, the Commission considers that the coefficient for seriousness should be set at 9, on a scale of 1 to 20. It stresses the fundamental nature of the State aid provisions and the need to eliminate the distortion of competition caused by the aid, the fact that over 100 recipients benefited, the amount not yet recovered at the time the present action was brought (EUR 569 million, by its calculations) and the fact that Spain has already been found not to have recovered unlawful aid in the Basque Country on two occasions.[92]

112. Consequently, it proposes a lump sum of EUR 25 817.40[93] per day, from the date of the 2006 judgment until the infringement was brought to an end on 15 October 2013. It calculates the number of days concerned to be 2 500 and the total thus to be EUR 64 543 500.

113. Spain submits that six different schemes were adopted by three different infra-State authorities, to each of which it will have to pass on a share of the penalties. Since the aid concerned only the Basque Country, which accounts for 6.24% of Spain's GDP, the current daily amount of EUR 210 should be multiplied by 6.24%, giving EUR 13 per day.

88 — Point 94 above.

89 — SEC(2005) 1658 (OJ 2007 C 126, p. 15), updated by SEC(2010) 923/3.

90 — Defined as a geometric mean based in part on the Member State's GDP and in part on the weighting of voting rights in the Council. For Spain, at the time when the present action was brought, the 'n' factor was 13.66 and the minimum lump sum EUR 7 215 000. Currently, the figures are 13.28 and EUR 7 036 000 respectively (C(2012) 6106 final of 31 August 2012).

91 — Currently, a minimum of EUR 210, multiplied by a coefficient for seriousness.

92 — Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, and Case C-177/06 *Commission* v *Spain*, cited in footnote 59.

93 — That is to say, EUR 210 multiplied by a coefficient of 9 for seriousness and by the 'n' factor for Spain of 13.66.

114. With regard to seriousness, Spain submits that the minimum coefficient should be applied, as the Commission had never before in 40 years exercised its powers with regard to State aid in the form of tax measures. Moreover, the measures in question were all adopted prior to the Commission notice on the application of the State aid rules to measures relating to direct business taxation, [94] and the Basque authorities repealed the schemes when they learned that the Commission considered them to constitute State aid.

115. On that basis, Spain proposes a fine of EUR 177.58 [95] per day.

116. The Commission rejects the notion that the basic amount should be multiplied by 6.24%. The amounts in question are the same for all Member States (and must be high enough to maintain pressure on them) [96] and the Court has not previously adjusted penalties to take account of the limited area in which an infringement takes place.

117. As regards seriousness, the Commission denies that it had not previously exercised its powers with regard to State aid in the form of tax measures [97] or that the 1998 notice changed the situation. [98]

118. In rejoinder, Spain refers to the judgment in *Commission* v *Italy*, [99] stressing that it is for the Court alone to determine the amount of any penalty. Where aid must be recovered from a large number of recipients, a penalty which takes account of progress made by the Member State in complying with its obligations may be appropriate and thus proportionate to the infringement. [100] In applying the criteria of seriousness and the Member State's ability to pay, the Court must consider the effects of non-compliance on public and private interests and the urgency of compliance by the Member State. [101] Any lump sum fine must depend on all the factors relating to the characteristics of the infringement and to the Member State's conduct, the Court having a wide discretion. [102] In the present case, the authorities acted conscientiously. Both the autonomy of the authorities of the Basque Country [103] and the principle of proportionality should lead the Court to modulate any penalty, having regard to the geographical area affected.

119. As regards seriousness, Spain submits in particular that the judgment [104] referred to by the Commission in connection with the 1998 notice was delivered in completely different circumstances, and that the absence of any precedent in similar cases complicates the calculation of both the amounts to be recovered and the interest to be charged, making compliance with the 2006 judgment more complicated. Moreover, the national authorities sought in good faith to apply the criteria which they thought correct when deciding whether specific aid was to be recovered.

94 — OJ 1998 C 384, p. 3 ('the 1998 notice').

95 — EUR 13, multiplied by a coefficient of 1 for seriousness and by the 'n' factor for Spain of 13.66.

96 — SEC(2005) 1658, point 15.

97 — It cites Commission Decision 93/337/EEC of 10 May 1993 concerning a scheme of tax concessions for investment in the Basque country (OJ 1993 L 134, p. 25).

98 — Joined Cases T-30/01 to T-32/01 and T-86/02 to T-88/02 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II-2919, paragraphs 314 and 315 and case-law cited.

99 — Case C-496/09 *Commission* v *Italy* [2011] ECR I-11483.

100 — Ibid., paragraph 49 and case-law cited.

101 — Ibid., paragraphs 56 and 57 and case-law cited.

102 — Ibid., paragraph 83 and case-law cited.

103 — Spain cites Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747.

104 — Cited in footnote 98.

Assessment

120. According to settled case-law, it is for the Court to determine, in the light of the circumstances and the degree of deterrence which appears to be required, the financial penalty appropriate for preventing similar infringements from recurring. The Commission's guidelines and suggestions cannot bind the Court, but may constitute a useful point of reference and contribute to ensuring that the Commission's own actions are transparent, foreseeable and consistent with legal certainty. It is for the Court to set the penalty at a level appropriate to the circumstances and proportionate to the infringement and to the Member State's ability to pay. Relevant considerations include the seriousness of the infringement and the length of time for which it persisted after the judgment establishing it was delivered. [105]

121. In the present case, it seems clear to me that the imposition of a lump sum fine is appropriate as a dissuasive measure. The amount of illegal aid concerned and the delay in recovery are both considerable, and it appears from the innumerable documents in the case-file that the Spanish authorities have devoted a good deal of time and energy to attempting to minimise the amounts to be recovered, often by entering into excessive detail entailing further delay.

122. The Commission seeks a lump sum fine of EUR 64 543 500, obtained by multiplying a basic rate of EUR 210 by a coefficient of 9 (for seriousness), by the 'n' factor of 13.66 and by 2 500 days.

123. Within the framework of the Commission's own published criteria, there is no scope for varying the basic rate of EUR 210 per day. That rate has remained constant in those published criteria throughout the material time concerned by the present proceedings. Spain's suggestion that it should be multiplied by 6.24% has been dismissed by the Court in Case C-610/10. [106]

124. However, the coefficient for seriousness could be reduced proportionally from 9 to 8 on a scale of 20, if the Court accepts my assessment of the amounts which in fact fell to be recovered. [107] The 'n' factor could also be reduced to 13.28, in the light of the Commission's updated figures. [108] That would give a lump sum of EUR 22 310.40 per day, as opposed to the EUR 25 817.40 originally claimed by the Commission.

125. The Commission calculates that 2 500 days elapsed between the delivery of the 2006 judgment on 14 December 2006 and final and complete recovery of the aid in issue. That calculation appears to me to be correct if the full period until 18 October 2013, when the Commission considered itself satisfied that all the aid and interest thereon had been recovered, is taken into account. That would result, at EUR 22 310.40 per day, in a total lump sum fine of EUR 55 776 000.

126. However, it is clear from the case-law that the Court's practice has never been to follow the Commission's detailed calculations when determining the amount of a lump sum but to determine a suitable amount, having regard to all the circumstances, in round figures. In doing so, it has not generally provided any precise detail of its reasoning but has merely pointed out the various aggravating and mitigating factors taken into account (such as, respectively, dilatory conduct or good faith on the part of the national authorities). Moreover, an analysis of the cases in which the Commission has requested and the Court has imposed such a penalty shows that, in every case, the amount imposed by the Court has been appreciably less than that sought by the Commission –

105 — For example, *Commission* v *Italy*, cited in footnote 99, paragraphs 35 to 37, and Case C-610/10 *Commission* v *Spain* [2012] ECR, paragraph 115 et seq.

106 — Cited in footnote 105, paragraph 132.

107 — Points 108 and 109 above.

108 — Footnote 90 above; in Case C-533/11 *Commission* v *Belgium* [2013] ECR, paragraph 35, the Commission itself relied on figures updated since it had brought its action.

varying between 8% and 62% of the latter sum and averaging about 40% thereof.[109] Without suggesting that the Court is in any way bound by its past practice in that regard,[110] I consider those figures to provide a useful background, particularly when viewed against the factors such as the seriousness and duration of the infringement which the Court has taken into consideration.

127. This is the fourth case in which the Commission has sought to impose a lump sum penalty on a Member State in respect of a failure to recover unlawful State aid (the other cases in which it has sought such a penalty relate essentially to a failure to transpose directives or non-conformity of national law with EU law, and are thus less comparable). The amount involved here is, by my assessment, EUR 322 million and the duration of the infringement is 6 years and 10 months.

128. By comparison, in Case C-369/07 *Commission* v *Greece*,[111] a failure to recover some EUR 23 million over a period of over four years gave rise to a lump sum penalty of EUR 2 million (about 13% of the amount claimed by the Commission); in Case C-496/09 *Commission* v *Italy*,[112] a failure to recover some EUR 188 million over some seven and a half years gave rise to a penalty of EUR 30 million (about 43% of the amount claimed by the Commission); and, in Case C-610/10 *Commission* v *Spain*,[113] a failure to recover some EUR 23 million over a period of more than 10 years gave rise to a penalty of EUR 20 million (about 38% of the amount claimed by the Commission).

129. Viewed another way, the amounts per month of delay and per million euro to be recovered are remarkably similar in the first two cases (between EUR 1 730 and EUR 1 740) whereas the amount in the latter case is appreciably higher (around EUR 8 333). Taking the former figure as a basis would result in an amount of about EUR 50 million, whereas taking the latter figure would give some EUR 220 million.

130. It would appear that a significant aggravating factor taken into account by the Court in Case C-610/10 *Commission* v *Spain* was the fact that compliance with the first judgment 'should not have met with major difficulties, given that the recipients of the unlawful aid in question were few in number, they were identified by name and the sums to be recovered were specified in that decision'.[114]

131. In the present case, that latter consideration does not hold true. The recipients were numerous, and the amounts of aid which fell, respectively, to be recovered or to be excluded from recovery were neither identified nor immediately obvious. I would therefore suggest that the Court take an approach similar to that in Case C-369/07 *Commission* v *Greece* and Case C-496/09 *Commission* v *Italy*, taking a sum of EUR 50 million as a starting-point.

109 — Case C-121/07 *Commission* v *France* [2008] ECR I-9159; Case C-109/08 *Commission* v *Greece* [2009] ECR I-4657; Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703; Case C-568/07 *Commission* v *Greece* [2009] ECR I-4505; Case C-407/09 *Commission* v *Greece* [2011] ECR I-2467; Case C-496/09 *Commission* v *Italy*, cited in footnote 99; Case C-610/10 *Commission* v *Spain*, cited in footnote 105; Case C-279/11 *Commission* v *Ireland* [2012] ECR; Case C-374/11 *Commission* v *Ireland* [2012] ECR; Case C-270/11 *Commission* v *Sweden* [2013] ECR; Case C-241/11 *Commission* v *Czech Republic* [2013] ECR; Case C-533/11 *Commission* v *Belgium*, cited in footnote 108; and Case C-576/11 *Commission* v *Luxembourg* [2013] ECR.

110 — Or that – contrary to the situation under Article 260(3) TFEU – the Court is precluded from imposing an amount higher than that sought by the Commission.

111 — Cited in footnote 109.

112 — Cited in footnote 99.

113 — Cited in footnote 105.

114 — Ibid., paragraph 145.

132. Nor do I see any cogent reason to increase or reduce that amount. It is a significant sum – higher than any lump sum previously imposed by the Court – likely to have a strong dissuasive effect for all Member States without there being any need to raise it. Yet the infringement is a serious one, involving State aid in amounts – higher than any previously in issue in any similar case – such as seriously to affect trade between Member States, over a considerable period of time (recovery did not begin to take place to any significant extent until more than four years had elapsed after the 2006 judgment).

Conclusion

133. In the light of all the foregoing considerations, I am of the opinion that the Court should:

— declare that, by failing to comply in good time with the judgment of 14 December 2006 in Joined Cases C-485/03 to C-490/03 *Commission* v *Spain*, the Kingdom of Spain has failed to fulfil its obligations under the decisions with which that judgment was concerned and under Article 260(1) TFEU;

— order the Kingdom of Spain to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 50 million;

— order the Kingdom of Spain to pay the costs.